

Appeal No. UKEAT/0493/13/LA

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 6 February 2014

**Before**

**THE HONOURABLE MRS JUSTICE SLADE DBE**

**(SITTING ALONE)**

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MR R C WILLIAMS

APPELLANT

LEUKAEMIA AND LYMPHOMA RESEARCH

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR ABOU KAMARA  
(Representative)  
Free Representation Unit  
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London  
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For the Respondent

MR MOHINDERPAL SETHI  
(of Counsel)  
Instructed by:  
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## **SUMMARY**

### **DISABILITY DISCRIMINATION – Disability**

Decision of the Employment Judge that the Claimant had failed to establish recurring or fluctuation effects of his impairment for the requisite period or extent upheld. There was no error of law or perversity in the decision that the Claimant was not a disabled person within the meaning of section 6 of the **Equality Act 2010**.

**THE HONOURABLE MRS JUSTICE SLADE DBE**

1. Mr Williams appeals from the Judgment of Employment Judge Glennie (“the Employment Judge”) sent to the parties on 27 June 2013 (“the Judgment”) following a Pre-Hearing Review on 13 June 2013. The Employment Judge decided that Mr Williams (“the Claimant”) was not a disabled person within the meaning of section 6 of the **Equality Act 2010** at the material time.

2. At the time of the hearing before the Employment Judge the Claimant had been in the employ of the Respondent since 20 August 2011. He was a Supporter Engagement Manager. By an ET1, received on 31 January 2013, the Claimant made a claim of disability discrimination. In paragraph 9.1 of the ET1 he wrote:

**“I suffer Chronic Clinical Depression and in times of stress have trouble with concentration. The leeway and time to go over details can be needed.”**

3. As recorded in the Judgment, the ET1 refers to events “mainly in October and December 2012 but just going into January 2013”.

4. At the outset of the hearing before me, Mr Kamara (Free Representation Unit) indicated that he wished to make an application to adduce fresh medical evidence. After enquiries were made, it appeared that no application or “fresh evidence” had been lodged with the EAT. Mr Kamara did not print any documents of the fresh evidence but, reading an email from his tablet, he stated that the evidence was a GP record ending in 2009, with visits the Claimant made to the GP surgery for depression recorded in 2001, 2002, 2005 and 2009. After considering the matter, Mr Kamara withdrew the application for fresh evidence to be put before the EAT.

## **The material statutory provisions**

5. The **Equality Act 2010**, section 6(1)(a), provides;

**“A person (P) has a disability if—**

**(a) P has a physical or mental impairment, and**

**(b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”**

6. Schedule 1 of the Equality Act provides as follows:

**“2 (1) The effect of an impairment is long-term if—**

**(a) it has lasted for at least 12 months,**

**(b) it is likely to last for at least 12 months, or**

**...”**

In subparagraph (2) it is provided:

**“(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”**

Subparagraph (4):

**“(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.”**

7. Guidance has been issued on matters to be taken into account in determining questions relating to the definition of disability. These were provided in 2011 (“the Guidance”). Section C of the Guidance deals with the meaning of “long-term” and “recurring or fluctuating effects.” C4 provides:

**“In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after**

that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).”

C5:

“The Act states that, if an impairment has had a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of ‘long-term’...”

8. In the box after C6 an example is given. The first example is:

“A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).”

That example is contrasted with the following:

“A woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she suffers a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period. However if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long-term requirement.”

### **The Judgment of the Employment Judge**

9. The Employment Judge recorded at paragraph 8 that there was no dispute but that the Claimant has an impairment. He has a chronic relapsing condition of depression. At paragraph 24, the Employment Judge accepted what the Claimant said about his condition and the effects that it has had since November 2012 and that those effects are substantial and adversely affected his ability to carry out normal day-to-day activities. The Claimant had asserted that the effects of his impairment were long-term because they were recurring or

fluctuating. The Respondent challenged his assertion. The Employment Judge reminded himself that, in deciding whether the effects of the impairment were long-term, recurring or fluctuating, he had to consider not whether the condition of depression was long-term but whether its effects were, to the degree required by the legislation, long-term. The Employment Judge referred to the medical evidence placed before him by the Claimant. At paragraph 23 he referred to a letter from the Claimant's GP. He summarised the effect of that letter as follows. The letter, he stated:

**"...repeats some aspects of the history and says this:**

**'His main symptoms lately have been of low mood, poor sleep and poor motivation. Depression is a multi-factorial illness but in Raymond's case, he has a chronic relapsing condition.'**

The Employment Judge continued:

**"There are then references to the medical records which show depression in 2001 which is described as agitated depression brought on by stress, 2006 depression again after 3 years symptom free, 2009 depression and 2010, work stress in March 2013 [and] emotional upset April 2013."**

10. The Employment Judge then referred to the witness statement which the Claimant put before him. At paragraph 26 he held:

**"Mr Williams' witness statement, as I have said, represents the situation from November up to today, so a period of about 7 months."**

In paragraph 27 the Employment Judge held:

**"The point is, it seems to me, that I have no evidence of what effects there were of Mr Williams' condition when he had the previous relapses which are referred to in the medical evidence. That being so, and in the absence of any medical evidence or direct evidence from Mr Williams as to what the effect on him of previous occasions was, I find that he not shown that there have been fluctuating or recurring effects of the necessary sort."**

11. The Employment Judge recorded that he had expressed to the parties a degree of concern, or at least a question, that the effects of his condition on the day-to-day activities of the Claimant did not seem to have been directly addressed in the medical evidence. The Employment Judge considered the material which had been placed before him and also noted the e-mail correspondence which had passed between the parties in which the Claimant stated that he considered that the bundle of documents to be placed before the Employment Judge contained the relevant evidence. The Employment Judge referred to a report from a Dr Beatson-Heard in which she recorded that the Claimant had told her that mental health issues had never previously impacted on his work. The Employment Judge inferred from this that what affected the Claimant since November 2012 was of a different order or a different quality from that experienced in any previous occurrences of his condition. Further, the Employment Judge noted that, at the CMD before another Employment Judge, the Employment Judge had explained to the Claimant

**“...the matters which it would be helpful for a report from his GP to address and which would assist in the determination of his disabled status.”**

12. The Employment Judge concluded at paragraph 32 that the Claimant had not discharged the burden of proving he was a disabled person at the material time. He had not established he had suffered recurring or fluctuating substantial adverse effects on his ability to carry out day-to-day activities. Notwithstanding that finding, the Employment Judge went on to consider briefly, at paragraph 33, whether the adverse effects of the impairment, depression, could be said to be long-term on the basis that there was a single period of substantial long-term adverse effect on day-to-day activities, which was likely to last for 12 months or more. Such a contention had not been advanced. The Employment Judge considered that, if such an argument had been advanced, it may have been said that seven months over a period of 12



months had passed by the time of the hearing before him. The Employment Judge considered that such an argument would not succeed. He observed:

**“I would have had to have found that it was as at October or December 2012 likely that the effects would have continued for 12 months at that time and there is no evidence before me on which such a finding could have been based.”**

13. The Employment Judge commented that this conclusion was not really material as the Claimant based his case on recurring or fluctuating effects. The Employment Judge concluded that, as the Claimant had not shown that he was disabled within the statutory definition at the relevant time, his complaint under the Equality Act disability provisions could proceed no further.

#### **The contentions of the parties**

14. The Notice of Appeal contained two grounds before the ground upon which oral argument has been developed before me today. Those two grounds are as follows: first, that the Employment Judge had a “minimal understanding” of the case at the time of the PHR. He did not allow himself sufficient time to read the documentation. Second, the Employment Judge wrongly dismissed the further medical evidence just made available by the GP practice, which further confirmed the long-term and debilitating effects of the Claimant’s illness.

15. So far as those two matters are concerned, no oral argument was developed in support of them and certainly, so far as the first ground of appeal is concerned, it was not pursued or relied upon. As for the third ground of appeal, Mr Kamara submitted that, on the evidence before him:

**“It was reasonable to assume that because of the historical nature of the impairment there were also the effects that were sometimes recorded, such as insomnia, and that these had a substantial adverse effect on the claimant’s day-to-day activities”.**

16. In other words, Mr Kamara submitted that the Employment Judge should have inferred from the fact that the Claimant had suffered over a long period of time from depression and that because, in November 2012 and for seven months thereafter, he had suffered effects which were substantial and had a long-term adverse impact on his day-to-day activities, therefore previous depression had had those effects, notwithstanding that there was no such evidence placed before him. Mr Kamara acknowledged that the Employment Judge was right to say that the Claimant's statement did not deal with the effect of his impairment on him before his suspension from work at the end of 2011. Mr Kamara also acknowledged that the medical evidence before the Employment Judge, in particular the letter from a Dr Lyle of 15 April 2013, which was referred to in paragraph 23 of the Judgment, sets out the occasions on which the Claimant attended the GP surgery with depression. The evidence gave some indication of the consequences of that depression, such as insomnia, but did not deal with any adverse effect on the Claimant's day-to-day activities or, in particular, whether such effects, if any were substantial. Nonetheless Mr Kamara, doing the best he could for his client, invited the Employment Appeal Tribunal to hold that the Employment Judge had erred in law in failing to hold that there were recurring or fluctuating adverse effects of the impairment to the statutory threshold to establish disability. Mr Kamara also referred to the case of **J v DLA Piper** [2010] IRLR 936 page 945, paragraph 45, as illustrating how short episodes of depression causing substantial adverse effects can be regarded as recurring and therefore long-term.

17. Mr Sethi, counsel for the Respondent, submitted that the Claimant has failed to identify any error of law on the part of the Employment Judge. Mr Sethi contended that the medical evidence before the Employment Judge did not support a finding that there were long-term effects of the underlying impairment of depression to the requisite standard. He submitted that there was, as the Employment Judge rightly held, no evidence before him which would enable

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him to conclude that, in the past, namely before October 2012, the depression undoubtedly experienced by the Claimant had substantial effects on the Claimant's day-to-day activities. The only evidence there had been to that effect was in regard to the period from October 2012 for some seven months going forward.

18. Mr Sethi contended that this is essentially a perversity appeal, which does not surmount the high hurdle that no reasonable Employment Judge, properly directing himself, could have reached the conclusion which this Employment Judge did.

### **Discussion and conclusion**

19. In **J v DLA Piper UK LLP** [2010] IRLR 936 the Employment Appeal Tribunal, presided over by Underhill P, as he then was, emphasised the need to take a structured approach to the question of whether a person falls within the statutory definition of a person with a disability. Two elements must be satisfied. First, that the claimant is suffering from an impairment, physical or mental, and second, whether that impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. At paragraph 40 Underhill P observed that:

**“It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.”**

20. The Employment Judge adopted a structured approach to the issue of whether the Claimant was a person who had a disability within the meaning of the Equality Act. He correctly decided the relevant time at which the Claimant had to show he had the disability, namely in October or November or December 2012. There is no challenge to that self-direction. The Employment Judge recorded that there was no dispute that the Claimant has an impairment, a chronic relapsing condition of depression. Further, the Employment Judge UKEAT/0493/13/LA

inferred that the effects of the impairment on his normal day-to-day activities are, and were from November 2012, substantial. As to whether the effects were long-term, the Claimant put forward his case as being one of recurring or fluctuating effects. The Employment Judge rightly referred to paragraph C5 in the statutory guidance on matters to be taken into account in determining questions relating to the definition of disability, 2011, as dealing with recurring or fluctuating effects. The Employment Judge was right to emphasise that what is relevant is whether the effects of the impairment were recurring or fluctuating, not whether the impairment was recurring or fluctuating. The Employment Judge referred to the medical evidence placed before him on whether the impairment had recurring or fluctuating adverse effects on the Claimant's day-to-day activities. In particular, he set out such evidence in paragraphs 21, 22 and 23. The Employment Judge considered the letter from the Claimant's GP of 15 April 2013 to which he refers. He sets out the material passage in the letter in paragraph 23 of his Judgment. That passage refers to the recent effects of the Claimant's impairment, namely, "His main symptoms [lately] have been of low mood."

21. Such evidence supported the conclusion of the Employment Judge that at the time of the Claimant's suspension at the end of 2012 he was suffering effects of his underlying depression, his impairment. However, that evidence does not support a conclusion as to the effects, if any, of the impairment at previous points in the Claimant's medical history.

22. In my judgment, the Employment Judge was entitled, indeed obliged, to deal with the claim as the Claimant advanced it. He had contended that the effects of the impairment were long-term because they had fluctuated or recurred. That test requires looking at the period of at least 12 months leading up to the index period of disability. In this case that was the period leading up to October to December 2012. The challenge made on behalf of the Claimant to the conclusion of the Employment Judge on this issue in paragraph 27 of the Judgment is really one

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of perversity. On the material before him it cannot be said that the Employment Judge erred in holding that there was an absence of medical evidence or direct evidence from the Claimant as to what the effect on him was of his depression on previous occasions. To fall within Schedule 1(1) the Claimant would have had to show that such effects had continued for a period of at least 12 months leading up to December 2012. That could be established if such effects were shown as having occurred in the past and were likely to recur. That is a question of fact for the Claimant to establish. The Employment Judge did not reach a perverse conclusion in that regard. The Judgment of the Employment Judge is careful and well reasoned. The appeal is dismissed.